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Attachment 2

Sent by Tele-fax; Original to Follow by Federal Express

March 12, 1998

Mark J. Riesenfeld
Community Development Director
County of Marin
3501 Civic Center Drive, # 308
San Rafael, CA 94903-4157

Re: Redwood Landfill

Dear Mr. Riesenfeld:

On behalf of Redwood Landfill, Inc., ("Redwood"), I am writing to you in your official capacity as an official overseeing the operations of the Staff of the Division of Environmental Health Services ("Environmental Health Services") within the Marin County Community Development Agency. As you know, Environmental Health Services acts as the "Local Enforcement Agency" ("LEA") of the California Integrated Waste Management Board ("Waste Board" or "CIWMB").

Specifically, I am writing in response to a March 10, 1998, letter from Edward J. Stewart, Chief of Environmental Health Services, to Doug Diemer, Site Manager, Redwood Landfill. (Attached hereto as Exhibit A.)

Mr. Stewart's letter of March 10th states that "the LEA directs you to discontinue the use of sludge derived alternative daily cover."

On behalf of Redwood Landfill, I hereby request that "the enforcement agency . . . hold a hearing . . . in accordance with the requirements set forth in [Public Resources Code] Section 44310." (Pub. Resources Code, § 44307.) My letter to you today constitutes "the filing of a request for a hearing by the person subject to the action within 15 days from the date that person is notified, in writing, of the enforcement agency's intent to act . . . ." (Pub. Resources Code, § 44310, subd. (a)(1).) Mr. Stewart's letter of March 10th appears to be intended to constitute "the taking of [an] enforcement action pursuant to Part 5 (commencing with Section 45000) by

the enforcement agency" within the meaning of Public Resources Code section 44307. "[W]ithin 15 days from the date of receipt of [this] request for a hearing[,]" the LEA must "provide written notice to the person filing the request notifying the person of the date, time, and place of the hearing . . . ." (Pub. Resources Code, § 44310, subd. (a)(2).)

In lieu of providing me with written notice of the date, time, and place of the hearing, the LEA may inform me in writing that: (1) Mr. Stewart's letter of March 10th is not "enforcement action pursuant to Part 5 (commencing with Section 45000)," is not enforceable, and has no effect; and (2) the LEA acknowledges the ongoing validity of its September 3, 1996, approval to Redwood for the use of sludge-derived alternative daily cover until such time as Redwood's existing solid waste facilities permit ("SWFP") is revised. The LEA's letter to me must unequivocally, clearly, and precisely express all of these sentiments, or it will be ineffective. If you choose to avoid a hearing by sending me such a letter, you must nonetheless do so "within 15 days from the date of [this] request for a hearing" or the letter will be ineffective. (Pub. Resources Code, § 44310, subd. (a)(2).) If you do choose to avoid a hearing by sending me such a letter, Redwood nonetheless reserves the right to invoke its right to a hearing in response to any enforcement action by the LEA.

You certainly should avoid a hearing by sending me the alternative letter that I have requested. The acknowledgement that I am requesting would be well supported. California Code of Regulations, title 14, section 18304 describes the requirements for initiating enforcement action. Mr. Stewart's letter of March 10th does not conform to those requirements. For example, section 18304, subdivision (c), requires that a "notice and order shall be accompanied by a declaration or affidavit of an employee or officer of the enforcement agency stating that the allegations contained in the notice and order are based either on personal knowledge or information and belief."

Part 5 of Division 30 of the Public Resources Code, referenced in section 44307, refers to three modes of "Administrative Enforcement": "corrective action orders" (§§ 45000-45001); "cease and desist orders" (§ 45005); and orders imposing civil penalties (§§ 45010-45024). "Enforcement action" is further defined in Title 14, section 18011, subdivision (a)(8), of the California Code of Regulations:

> "'Enforcement action' means an action of the enforcement agency or the board, taken pursuant to the act or this chapter, including, but not limited to issuing a notice and order, a cease and desist order, cleanup or abatement order, or a corrective action order; to institute a proceeding to modify, suspend, or revoke a permit; to institute a judicial proceeding to obtain an injunction; or to institute a judicial action to obtain civil penalties."

Section 18304, subdivision (d), of Title 14 specifies six types of notices and orders that may issue. Mr. Stewart's letter of March 10th stated that "the LEA directs [Redwood] to discontinue" a particular practice, but his letter does not self-evidently fit within any of the six allowable categories of notice and order established under section 18304, subdivision (d). Redwood should not be in the position of having to guess what the LEA is intending to do through Mr. Stewart's recent letter. Nonetheless, attempting to do so, I would venture that his letter comes closest to one of the following: "(1) An order directing the operator . . . to cease and desist from continuing to commit the specified violations by a specified date"; or "(2) An order directing the operator . . . to . . . abate, or otherwise remedy the violations by taking specified actions by a specified date." (Cal. Code Regs., tit. 14, § 18304, subds. (d)(1) & (2).)

"[D]iscontinue" sounds a lot like "cease and desist." Yet Mr. Stewart could not possibly mean the letter to be a "cease and desist" order. "A violation of a standard that does not also constitute a violation of a permit and *does not constitute an emergency hazard, pollution, or nuisance* is not grounds for issuance of a cease and desist order or an order to clean up and abate. (Public Resources Code section 45000-45007 and 45300.)" (Comment to Cal. Code Regs., tit. 14, § 18304 (emphasis added).)

Redwood's continued use of sludge-derived alternative daily cover "does not constitute an emergency hazard, pollution, or nuisance"; and no rational person could credibly make any such claim. Mr. Stewart's letter of March 10th states: "We are aware that the California Integrated Waste Management Board has approved all of the ADC materials we allowed for in our letters to you." Mr. Stewart thus is candid in acknowledging that the LEA can have no conceivable objection to the materials themselves. His letter, however, goes on to state that "while a product may be deemed suitable as an ADC, both the process(es) used to obtain the products and the site specific application of the products require further evaluation before formal permitting." Whether further site specific evaluation is required before permitting is one issue. A distinct issue, however, is whether use of sludge-derived alternative daily cover constitutes an emergency hazard, pollution, or nuisance.

As Mr. Stewart admits, such materials have been fully evaluated and approved. Furthermore, these materials do not constitute an emergency hazard, pollution, or nuisance when applied to this specific site. Mr. Stewart is well aware of this fact. The reason why "the California Integrated Waste Management Board has approved all of the ADC materials" used at Redwood is that "[s]ite-specific demonstration projects have shown that these ADC materials can be used as suitable daily cover if used in accordance with the standards established." (CIWMB, LEA Advisory No. 48, Disposal Site Daily and Intermediate Cover (Dec. 30, 1997).) The "[s]ite-specific demonstration projects" where sludge and sludge-derived materials were "used in accordance with the standards established" include demonstration projects conducted at the Redwood site and concluded on August 29, 1996, and October 22, 1997.

Mr. Stewart's letter ignores representations made to Redwood in a letter from the LEA dated September 3, 1996 (Exhibit B), and, more recently, a December 15, 1997, document entitled, "Final Report: Alternative Daily Cover Demonstration Project Utilizing Sludge Dried by the Windrow Method at Redwood Landfill" ("Final Report") (Exhibit C).

The latter document clearly reveals that the use of sludge-derived alternative daily cover does not constitute any kind of "emergency hazard, pollution, or nuisance." The Final Report admits that sludge-derived alternative daily covers employed at Redwood "are suitable for use as ADC. Consequently, approval was given by this office for the continued use of sludge ADC at Redwood Landfill prior to a pending revision of Redwood's Solid Waste Facility Permit (SWFP)." *The LEA thus has admitted that site-specific use of these materials at Redwood "does not constitute an emergency hazard, pollution, or nuisance" and, therefore, "is not grounds for issuance of a cease and desist order or an order to clean up and abate."*

Either Mr. Stewart's letter of March 10th constitutes enforcement action or it does not. If it does, we are initiating hearing procedures, as we have a right to do. If it does not, then Redwood declines Mr. Stewart's unenforceable invitation to discontinue the use of sludge-derived alternative daily cover.

If Mr. Stewart's letter of March 10th is intended to constitute enforcement action, then this "request for a hearing shall stay the effect of . . . the order pending completion of all appeals." (Pub. Resources Code, § 45017, subd. (a)(1).) This stay is effective, and direction to discontinue use of sludge-derived alternative daily cover does not take effect upon issuance or service, since the LEA is unable to find "that the actions or inactions associated with [the letter] may pose an imminent and substantial threat to the public health and safety or to the environment." (Pub. Resources Code, § 45017, subds. (a)(2) & (3).) I have already explained the reasons why the LEA is unable to make this finding, in explaining that site-specific use of sludge-derived materials at Redwood "does not constitute an emergency hazard, pollution, or nuisance."

I intend to be absolutely clear on this point: by filing this request for hearing panel review, the LEA is establishing a legal right to continue its use of sludge-derived ADC unless and until such time as the LEA hearing panel or, on appeal, the California Integrated Waste Management Board finally resolves the instant dispute against Redwood.

Mr. Stewart's letter of March 10, 1998, correctly states that, "[i]n letters to you dated . . . September 3, 1996 Environmental Health Services, as the Local Enforcement Agency (LEA) . . . granted to Redwood Landfill interim use of" a variety of sludge-derived products. His letter of March 10th, however, also contains numerous outstanding mistakes. Below, I will address the most obvious ones.

Mr. Stewart's letter of March 10th omits mention of the fact that the LEA's September 3, 1996, approval to Redwood for use of sludge-derived materials was expressly granted "until such time as the SWFP is revised." (Attached hereto as Exhibit B.) The approval was also subject to numerous, detailed, express conditions. Redwood has complied with all of those conditions. None of those conditions in any way qualified the commitment by the LEA to allow use of sludge-derived alternative daily cover until the revised permit is issued. Completion of the permit revision process was neither a condition of the approval nor an expectation of the LEA.

Mr. Stewart's letter of March 10th obliquely and nonsensically attempts to characterize *completion of the permit revision process* as a condition of continued use of sludge-derived alternative daily cover *during the period leading up to completion of the permit revision process*. Mr. Stewart's March 10, 1998, letter inaccurately states as follows:

> "While the above referenced letters allowed for continued use of 'non-permitted' ADC processing methods, that allowance was granted because it was our *expectation* that *a revision* of Redwood's SWFP was imminent."
>
> (Emphasis added.)

The LEA did not impose a condition related to the timing of ultimate permit revision. I have already pointed out that while the September 3, 1996, letter contains numerous detailed conditions, there is absolutely no condition of the type Mr. Stewart imagines. If the LEA had an "expectation" that it wished to establish as a "condition" of its approval, LEA staff clearly knew how to draft suitable language. If permit "revision" by a particular time had indeed been an "expectation" of the LEA, then LEA officials had innumerable means at their disposal with which to communicate that notion. A unilateral expectation, not communicated orally or in writing to a party seeking a permit or entitlement, cannot be a condition of such a permit or entitlement. The revocation of an agency approval of a private activity based on such an unstated expectation would be arbitrary and capricious, and would ignore the reasonable investment-backed expectations created by the approval. Furthermore, because such action would deprive the private entity of a vested property interest, the action would constitute a "taking" requiring just compensation in the form of money damages.

Redwood has made substantial investments in the process of creating sludge-derived ADC – and has done so in response to requests from public agencies, including the City of Novato, that wanted to be able to get credit for diverting materials that would otherwise go to landfills. For Novato, the diversion of sludge is a key component of its program for achieving the statutory 50 percent diversion requirement for the year 2000, as set forth in "AB 939." (Pub. Resources Code, § 41780, subd. (a)(2).) The failure of any city or county to meet its diversion obligations can subject the entity to fines totalling as much as $10,000 per day. (Pub. Resources Code, §

41850, subd. (a).) Thus, Mr. Stewart's precipitous action may cause of host of financial problems not only for Redwood but also for Novato and other public entities.

In his recent epistle, Mr. Stewart not only conflates "expectation" with "condition"; he also misrepresents the LEA's "expectation." In a letter dated October 22, 1996, from the LEA to Doug Diemer of Redwood Landfill (attached hereto as Exhibit D), the LEA stated that:

> "Current use of these products was approved *pending permit revision* with the understanding that *the process for permit revision* was imminent. . . . [¶] Please send to this office at your earliest convenience a detailed account in the form of a project description which is both accurate and complete describing all permit changes that have been made or are anticipated to be made. Also, it will be required pursuant to 14 CCR 18211 that you file an application for revision of the permit."
>
> (Emphasis added.)

These statements make clear that the LEA considered the commencement of the "process for permit revision" to be imminent, not the issuance of a revised SWFP. Mr. Stewart is attempting to rewrite history in a way that is grossly unfair to Redwood and ignores the enormous investments it has made in reliance on past LEA approvals to use sludge as a component of ADC. *The LEA has clearly authorized the continued use of sludge within ADC until the SWFP is formally and finally revised* -- a milestone that Redwood has sought to achieve expeditiously, while the LEA has refused to accept our application as complete, and has failed to date to determine the scope of any required environmental review.

The scope of Redwood's existing entitlement is evident from the December 15, 1997, final report, which stated that "approval was given by this office for *the continued use of sludge ADC at Redwood Landfill prior to a pending revision of Redwood's Solid Waste Facility Permit (SWFP).*"

I call your attention to condition number six of the September 3, 1996, letter, which identifies what Redwood must do "[b]etween the months of October and April." I also suggest you review condition number eight, which requires Redwood to "provide the Office of Waste Management with reports . . . on a quarterly basis." Condition number three ties "the design and scope of this operation" to Redwood's original report proposing use of sludge-derived materials as ADC "*until such time as the SWFP is revised.*" (Emphasis added.) No reasonable person could read these conditions and conclude that they reveal any expectation or condition that permit revision must be completed by any particular point in time for the LEA's approval to remain in effect. A condition that compels Redwood to perform a particular duty "quarterly" certainly bespeaks

an intent that use of sludge-derived ADC may continue for a substantial period of time, even indefinitely.

It has never been the LEA's own expectation or understanding that completion of the permit revision process was a condition of the continued use of sludge-derived alternative daily cover during the period leading up to permit revision. Rather, as the LEA's October 22, 1996, letter makes clear and is noted above, the LEA's commitment to allow sludge-derived alternative daily cover until "permit revision" was based on an understanding that "the *process* for permit revision was imminent." Lest Redwood officials should suffer from any uncertainty as to what the LEA means by "the process for permit revision," the LEA's October 22nd letter makes that crystal clear: the submission of a project description and application for permit revision. Redwood proffered such submissions on December 10, 1996. With the vast amount of time and resources that the LEA and Redwood have devoted to revising the permit, no one can dispute that the process for permit revision began long ago.

Furthermore, while the October 22, 1996, letter may establish that the LEA possessed an "expectation" that the permit revision "process" was about to commence, the existence of that expectation was not translated into a retroactive modification of the express conditions set forth in the prior letter of September 3, 1996. The latter communication contained eight conditions, none of which Redwood has violated. In an effort to rationalize the misstatements in Mr. Stewart's letter of March 10th, the LEA cannot honestly point to any grounds contained either within the September 3, 1996, approval itself or within the LEA's own later expressions of the meaning of that approval.

Mr. Stewart's letter of March 10th also states that "both the process(es) used to obtain the products and the site specific application of the products require further *evaluation* before formal permitting." (Emphasis added.) I interpret this statement to allude to a purported need for environmental review under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, div. 13, § 21000 et seq.). I note that Mr. Stewart's statement is confined to the premise that, before the LEA may approve Redwood's revised permit, the LEA must identify and comply with its obligations under CEQA. As you know, Redwood has submitted an enormous amount of material in connection with its proposed formal SWFP revision. To date, the LEA has not yet accepted the application as complete. Nor has the LEA determined the scope of any environmental review that will be required. [1]

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[1]/ As you may know, I have urged, in previous correspondence with Deputy County Counsel Deborah Bialosky, that the County has a legal obligation to try to avoid preparing a "subsequent EIR" or "supplemental EIR" in the absence of facts that truly mandate the preparation of such documents, as set forth in Public Resources Code section 21166 and CEQA Guidelines section 15162.

36-14

Approval by the LEA in the near future of Redwood's *revised permit* is distinct from approval by the LEA of Redwood's *use of sludge-derived ADC during the period preceding permit revision.* If the LEA now maintains, nearly 18 months after Mr. Janofsky granted Redwood permission to proceed with the use of biosolids for use as ADC pending completion of Redwood's formal SWFP revision, that the LEA's action was in violation of CEQA, such an assertion against interest by a lead agency would be unprecedented in my experience. *The LEA, not Redwood, has the legal obligation to comply with CEQA.* Redwood assumed in 1996, as it does now, that the LEA believed then that its action was exempt from CEQA. Notably, in a June 2, 1997, letter to Doug Diemer of Redwood Landfill, Ed Stewart expressly invoked the Class 6 categorical exemption (CEQA Guidelines, § 15306) in approving the continued use of biosolids for ADC and the use of windrow processing on a temporary basis. (A copy of this letter is attached hereto as Exhibit E.) Mr. Stewart asserted as follows:

> "We have submitted your proposal request to the County Environmental Coordinator Tim Haddad for his review for California Environmental Quality Act (CEQA) compliance. As was the case for your original sludge air drying demonstration project, a Notice of Exemption shall be filed classifying this proposal as a Class 6 Categorical Exemption as provided for by section 15306 of CEQA."

I assume that the LEA reached a similar conclusion when Mr. Janofsky wrote his letter in September 1996. He might also have relied on the following categorical exemptions: class 1 (existing facilities); class 4 (minor alterations to land); class 5 (minor alterations in land use limitations); and class 8 (actions by regulatory agencies for the protection of the environment). (See CEQA Guidelines, §§ 15301, 15304, 15305, and 15308.) In the event that the LEA now feels that its September 3, 1996, approval may have been made "without having determined whether the project may have a significant effect on the environment," the LEA should be aware that the 180 day statute of limitations has run for "[a]ny action or proceeding to attack, review, set aside, void, or annul" that approval. (Pub. Resources Code, § 21167, subds. (a), (d).) Thus, the LEA's decision that its September 1996 action was exempt from CEQA is now legally unassailable. (See Pub. Resources Code, § 21167.2; Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California ("Laurel Heights II") (1993) 6 Cal.4th 1112, 1130 [26 Cal.Rptr.2d 231].)

In the upbeat tone of Mr. Stewart's ukase of March 10th, let me say that "[w]e enthusiastically support" what at least appears to be an effort by the LEA to finally make some progress toward determining the scope of any environmental review that will be required in connection with Redwood's permit revision. There is no basis in CEQA, however, for agency action to review the LEA's September 3, 1996, approval.

36-15

Mr. Stewart's letter of March 10th cites the following as a further consideration underpinning his directive: "Controversy regarding air quality issues continues." The fact that the LEA no longer has regulatory authority over air quality issues was recently acknowledged in a January 9, 1998, letter to me from your County Counsel, in response to my letter of December 24, 1997, in which I discussed at length the legal implications of the "the Solid Waste Disposal Regulatory Reform Act of 1993" (Stats. 1993, ch. 656), also known as "AB 1220." As you probably have learned from County Counsel, that statute eliminated the prior regulatory authority the LEA had with respect to odors or other emissions generated at the Landfill, as well as with respect to water quality issues. Although County Counsel asserted -- incorrectly, we believe -- that Redwood has no current legal entitlement whatsoever to conduct air drying, he generally agreed with me and Waste Board Legal Staff that the LEA no longer has regulatory authority to address air quality issues generally or odor concerns specifically.

My letter to him also demonstrated that the law is clear that, even where an existing SWFP includes conditions dealing with air quality issues, an LEA has no legal authority to try to enforce such conditions. My letter included, as an exhibit, a copy of a memorandum prepared by Waste Board legal staff expressly reaching that conclusion. (See June 27, 1995, Memorandum entitled, "AB 1220 and Board Authority," from Waste Board Staff Counsel Elliott Block to Chief Deputy Director Dorothy Rice, attached to my December 24, 1997, letter to County Counsel.) [2]

Mr. Stewart's March 10, 1998, letter goes on to state that "Approval from all appropriate agencies has not been given." As you know, the Staff of the Division of Environmental Health Services within the Marin County Community Development Agency acts as the LEA of the CIWMB. Please, if you can, point to a statutory or regulatory authority empowering Mr. Stewart to take action on behalf of "all appropriate agencies." In enacting AB 1220, the Legislature proclaimed its intent that "[a] clear and concise division of authority shall be maintained in both statute and regulation to remove all areas of overlap, duplication, and conflict between the [CIWMB] and the state water board and regional water boards, or between the board and *any other state agency*, as appropriate." (Pub. Resources Code, § 43101, subd. (c)(1) (emphasis added).) Mr. Stewart's letter states that "it is [the LEA's] responsibility to insure that before entitlement is granted, all appropriate statutes and regulations have been met." The term "appropriate" is overbroad. The LEA is a State-certified agency with a narrow charge.

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[2]/ That memorandum from Waste Board Legal Staff expressly stated that permit provisions in existing SWFPs "that are not within the Board's jurisdiction are no longer enforceable because the Board, and consequently the LEA, no longer has authority to enforce them." For your convenience, I have attached a copy of that memorandum as Exhibit F to this letter.

For the reasons set forth above, please either schedule a hearing before the LEA hearing panel at which Redwood can contest Ed Stewart's command that it halt continued use of sludge in alternative daily cover, or notify me within the next fifteen days, in unequivocal terms, that Mr. Stewart's directive was in error, is unenforceable, and is formally withdrawn.

Sincerely,

James G. Moose

cc: Cynthia Barnard
Patrick K. Faulkner
Douglas G. Sobey
Duane Woods
Douglas Diemer
Deborah Bialosky
Alan Friedman
Reinhard Hohlwein
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